Filed 6/5/09 P. v. Diep CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES DIEP, Defendant and Appellant.	G039379 (Super. Ct. No. 05ZF0092) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Dennis P. O'Connell for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Senior Assistant Attorney General, Steve Oetting, Felicity Senoski, and Lynne McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

James Diep appeals from a judgment after a jury convicted him of first degree murder, attempted murder, and street terrorism, and found true various firearm and street terrorism enhancements. Diep argues the trial court erroneously admitted his involuntary statements and erroneously instructed the jury. Although we conclude Diep's statements were coerced and, therefore, involuntary, he was not prejudiced. Additionally, his claim the trial court erroneously instructed the jury has no merit. We affirm the judgment.

FACTS

Natoma Boys, Natoma Boys Jr., Asian Crips, and Young Loccs were allied criminal street gangs that supported each other against rival gangs. Some of their rivals were Dragon Family, Dragon Family Jr., Asian Gang, and Asian Gang Jr.

Diep, also known as "Hitman" or "Batman," was a member of Natoma Boys Jr. In criminal street gang culture, respect is extremely important, and if a gang disrespects another gang, the humiliated gang is expected to retaliate with equal or greater force, or be humiliated. Natoma Boys Jr. was disrespected twice, in one day, and rather than risk embarrassment, sought retaliation.

At La Quinta High School, people had congregated to watch a fight. During the fight, a Dragon Family Jr. gang member shot at a Natoma Boys Jr. gang member. Meanwhile, an Asian Gang gang member attacked the cousin of a Natoma Boys Jr. gang member at a local cafe. Natoma Boys Jr. and its allies called a meeting at Tung Huynh's "Slammer" garage. During the meeting, Quoc Nguyen "C-Stick" produced a violin case that contained a shotgun. When the meeting adjourned, approximately nine men got into four cars with the intent to retaliate against their rivals. Diep and Nguyen, armed with his violin case, got into Diep's car. The men searched areas of Garden Grove where Asian gang members are known to congregate.

Eventually, Nguyen spotted two Dragon Family gang members in a car, and he told Diep to follow them. After they stopped, Diep drove past them and made a U-turn three times. As he drove towards the rival car, Diep turned off his lights and slowly pulled next to the car. Nguyen said, "'Fuck DFJ'" and fired the shotgun at the driver's side of the car. Nguyen killed Nahn Chuong and severely wounded Duong Phan. Diep drove Nguyen to Riverside, and the others drove away.

A couple months later, officers arrested Diep, and Officer Ronnie Dean Echavarria interviewed him. Because Diep contends his statements during the interview were involuntary, we detail them below. Suffice it to say, Diep admitted he was present, but claimed he did not know Nguyen was going to shoot the men. After the interview, Diep led officers to the Riverside home where he dropped off Nguyen. Officers found the shotgun and shells buried in the backyard.

An amended indictment charged Diep with murder (Pen. Code, § 187, subd. (a))[1] (count 1), willful, deliberate, and premeditated attempted murder (§§ 664, subd. (a), 187, subd. (a)) (count 2), and street terrorism (§ 186.22, subd. (a)) (count 3). The amended indictment alleged the special circumstances that count 1 was a murder by drive-by shooting (§ 190.2, subd. (a)(21)) and was committed for a criminal street gang (§ 190.2, subd. (a)(22)), and alleged Diep was a gang member who vicariously discharged a firearm causing death (§ 12022.53, subds. (d), (e)(1)). The amended indictment also alleged Diep was a gang member who vicariously discharged a firearm causing great bodily injury as to count 2 (§ 12022.53, subds. (d), (e)(1)). Finally, the amended indictment alleged Diep committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

---

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

At trial, the prosecutor offered the testimony of Officer Peter Vi, a gang expert. After detailing his background, training, and experience, he testified concerning the culture and habits of criminal street gangs. Vi opined Diep was an active participant of Natoma Boys at the time of the incident. Based on a hypothetical question mirroring the facts of the case, Vi also opined the offenses were committed in association with and for the benefit of a criminal street gang.

On cross-examination, defense counsel asked Vi whether it was true that when a gang member commits a crime, they want people with them whom they can trust. Vi responded it was true, and counsel asked why. Vi explained it was because the gang member would not want the other people talking to the police and the other people act as "back up," either as a lookout or a driver. When counsel asked Vi whether the gang member would want to know that the person driving the car could be trusted, Vi stated the gang member depends on the driver to get to the scene to commit the crime and to leave the scene after the crime.

Diep testified on his own behalf and admitted he was a member of Natoma Boys Jr. since the age of 16 or 17. Diep explained that after the fight at Café Hien and shooting at La Quinta High School, he received a telephone call and someone told him to meet at a friend's garage. Shortly after he arrived, a man who had been attacked by the Asian Gang arrived. A little later, Nguyen arrived with a shotgun. Nguyen told Diep to get in Diep's car and Nguyen, armed with the shotgun, also got in. Diep stated he did not believe Nguyen would shoot anyone that night, but that they would drive around and "it was just going to blow over." They drove around for approximately one and one-half hours with other gang members following in another car. Nguyen told Diep he recognized someone in a passing car and told Diep to follow the car. Nguyen told Diep to make a U-turn and stop next to the car. Nguyen asked the men where they were from and they said they did not want any trouble. Diep stated he started to drive away when Nguyen told him to make a U-turn and go back. Diep did as instructed because "[he]

knew if [he] didn't do what [Nguyen] demanded, [Nguyen] would have killed [him]." When Diep drove along side the car, Nguyen told Diep to turn the car's lights off. Nguyen put the shotgun out the window, yelled "F[uck] D.F.J.[,]" and shot at the guy's head.

On cross-examination, Diep admitted that when they drove around they were looking for their "enemies" and Nguyen would use the shotgun on an enemy. Diep also stated he told Echavarria he was not afraid of Nguyen, but he was lying. He did not remember telling anyone, "'Two down, quick style, point blank[.]'"

The jury convicted Diep of count 1, first degree murder, and counts 2 and 3. As to count 1, the jury did not find true either of the special circumstances but the jury did find it to be true he was a gang member who vicariously discharged a firearm causing death and he committed the first degree murder for the benefit of a criminal street gang. With respect to count 2, the jury did not find it to be true Diep committed attempted murder willfully, deliberately, and with premeditation, but the jury did find it to be true Diep was a gang member who vicariously discharged a firearm causing great bodily injury and he committed the attempted murder for the benefit of a criminal street gang.

After denying Diep's motion for a new trial, the trial court sentenced Diep to 50 years in prison. Diep retained his trial counsel to represent him on appeal.

DISCUSSION

I. Voluntariness of Confession

Diep argues his statements to Echavarria were involuntary because he was promised leniency in exchange for his confession. We agree Diep's statements were both involuntary and coerced but conclude he was not prejudiced.

A. Legal Principles

"'The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.] [These provisions] require[ ] the prosecution to

establish, by a preponderance of the evidence, that a defendant's confession was voluntary. . . . [¶] Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. . . . On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.] In determining whether a confession was voluntary, "[t]he question is whether defendant's choice to confess was not 'essentially free' because his will was overborne."' [Citation.] [¶] . . . [¶]

'It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible . . . ."' [Citations.]

'Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect. . . . Yet in carrying out their interrogations the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession. . . . [The

police] are authorized to interview suspects who have been advised of their rights, but they must conduct the interview without the undue pressure that amounts to coercion and without the dishonesty and trickery that amounts to false promise.' [Citation.]" (*People v. Holloway* (2004) 33 Cal.4th 96, 114-115, fn. omitted.)

B. Evidence Code Section 402 Hearing

Before trial, the prosecutor moved to admit Diep's statements to Echavarria, and Diep opposed the motion. At the Evidence Code section 402 hearing, Echavarria testified he had a brief conversation with Diep that was not recorded, but he never made any promises of leniency. After hearing argument, the trial court indicated it would review the interview transcript and issue its ruling by minute order. The court concluded Diep's statements were voluntary and, therefore, admissible.

C. Interview

After Echavarria told Diep that he was under arrest for a gang-related murder, advised him of his *Miranda*[2] rights, and obtained his background information, he told Diep most of his friends were in jail, he knew what happened, and "[they] only want one guy and that's the guy [who] physically pulled the trigger." Following a discussion about Diep's gang history, Echavarria stated, "And eventually all this goes before the [prosecutor] and he decides who he prosecutes and who he doesn't prosecute. But, the truth is your saving grace." Echavarria told Diep he knew who fired the weapon and said, "If you didn't, you didn't physically pull the trigger, there's always hope for you." After a long discussion about the incident at the high school and the fight, Echavarria implored Diep to tell the truth and said, "[W]e know who pulled the trigger. That's the only guy we really want." Diep eventually admitted he was at the garage and explained they were talking about what had happened. Echavarria asked Diep to tell him what happened, and stated, "And, and you have to decide what you wanna [*sic*] do here. If you

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

don't want to be put in the car with, uh [*sic*], 'C,' prosecuted for murder straight out, if it was your thing, if you planned it. . . . Because if you don't cooperate, then you're gonna [*sic*] be prosecuted as a person that, that is not cooperating, that is just, that is, uh [*sic*] neck and neck with 'C.' . . . If you cooperate, you tell the truth, all this is eventually gonna [*sic*] go to the [prosecutor's] [o]ffice. And I have some say as to what happens to you, okay? Do you understand what I'm saying?"

Echavarria told Diep he would eventually have to explain what happened because when the prosecutor tries the case, "[He] may or may not have to get on the stand. It's up to the [prosecutor], okay? . . . [¶] . . . [¶] If you choose to hide the truth or to think that you're gonna [*sic*] get away, okay, if you don't tell the truth here, then we have to treat you as though you did pull the trigger, if that's the way it happened. . . . [I]f you don't cooperate and tell the truth, then we're gonna [*sic*] have to treat you as though you did pull the trigger. Do you understand what I'm saying? If this doesn't scare you, it should. . . . I want you to tell me the truth. Because it could make a difference with what happens with the remainder of your life." Echavarria told Diep he had only one chance to tell the truth, and "if you back 'C' then you are gonna [*sic*] get what you have coming, okay? If you, if you cooperate, that's gonna [*sic*] make a big difference as to what happens with you and the [prosecutor] and the judge and ultimately in front of the jury. . . . [¶] . . . [¶] . . . And I'm telling you right now, as far as the [prosecutor], they only want the guy that pulled the trigger. That's all they want. What happens to you depends upon me and the [prosecutor]. I just don't want you to bullshit, because if you lie then you're gonna [*sic*] get thrown down to the cell, you're gonna [*sic*] be prosecuted just like as if you pulled the trigger. You understand?" Diep asked Echavarria if he wanted him to explain what happened beginning from the time he was in the garage and Echavarria said he did.

Diep eventually told Echavarria what happened but claimed he did not want to participate and Nguyen pressured him to participate. Echavarria left the room, and

when he returned, he accused Diep of selective honesty and asked him where they went after the shooting. Echavarria stated: "Don't you understand that if you withhold this information you're just slamming the door on yourself? [¶] . . . [¶] . . . I know that bothers you, but ultimately when this goes before the jury, you do not want to be locked up for life. Okay? I don't get to decide what happens to you. If you do not come clean and I'm telling you this honestly, okay? . . . [Y]ou don't have to go down, you don't have to flush your life down the toilet. . . . You want to flush your, your life down the drain and be some solid homeboy and do joint time? Then don't tell me. But if you want to walk away from this the only chance you have is to fully cooperate." Diep finally stated he could point out the house if driven by it.

D. Analysis

In his opening brief, appellate counsel spends 13 and one-half pages reciting familiar boilerplate legal principles, but only one paragraph advancing his legal argument (a brief nearly identical to his written brief to the trial court). Appellate counsel's curt analysis focuses on Echavarria's statements he only wanted the "shooter," the prosecutor would use him as a witness, and if Diep did not cooperate, he would be prosecuted the same as the "shooter," to demonstrate he was promised leniency and, therefore, his statements were coerced and involuntary. We conclude Diep's statements were involuntary, not only because he was promised leniency but also because he was threatened, a point on which appellate counsel does not provide any reasoned argument.

Law enforcement officers may advise a suspect to tell the truth (*People v. Jimenez* (1978) 21 Cal.3d 595, 611 (*Jimenez*)),[3] employ moral and psychological pressures (*Oregon v. Elstad* (1985) 470 U.S. 298, 304-305), or use trickery to extract a confession (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240). But it is well settled officers may not overbear the will of the suspect and coerce the suspect into making a

[3] *Jimenez, supra,* 21 Cal.3d 595, was overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.

confession. (*People v. Maury* (2003) 30 Cal.4th 342, 404.) With respect to promises of leniency, Echavarria repeatedly told Diep he only wanted the "shooter" or the person who "pulled the trigger" and that if he did not "pull the trigger," there was "always hope for [him]." Additionally, Echavarria stated that "if [he] want[ed] to walk away from this the only chance [he had was] to fully cooperate." Although near the beginning of the interview Echavarria told Diep the prosecutor decides who to charge, subsequently he told Diep twice he did "have some say as to what happens to [him.]" Echavarria led Diep to believe he had control over what happened to him and implicitly promised him that if he told the truth, he would "walk away" and not serve any prison time.

As to threats of punishment, Echavarria told Diep that if he did not cooperate and tell the truth, he would "be prosecuted as a person that, that is not cooperating[.]" He added if Diep did not tell the truth the prosecutor would "treat [him] as though [he] did pull the trigger[.]" He added, "If this doesn't scare you, it should." After Echavarria told Diep that the prosecutor only wants the person who pulled the trigger, he added, "What happens to you depends upon me and the [prosecutor]. I just don't want you to bullshit, because if you lie then you're gonna [*sic*] get thrown down to the cell, you're gonna [*sic*] be prosecuted just like as if you pulled the trigger. You understand?" Again, Echavarria led Diep to believe he had control over what happened to him and threatened being "thrown down to the cell" if he did not cooperate.

In *In re J. Clyde K.* (1987) 192 Cal.App.3d 710, 713-715 (*J. Clyde K.*),[4] is instructive. In *J. Clyde K.*, officers stopped three juveniles while conducting surveillance in a high theft area. An officer told the boys that if they told the truth he would cite them, but if they lied, they would go to jail—one of the boys confessed. The court concluded the boy's statements were involuntary because the officer's statements led the boys to believe that if they confessed they would receive more lenient treatment. (*Id.* at pp. 722.)

[4] *J. Clyde K., supra,* 192 Cal.App.3d 710, was overruled on another grounds in *People v. Badgett* (1995) 10 Cal.4th 330, 350.

Similarly, based on all Echavarria's statements, we think the message was clear—if Diep cooperated he would "walk," but if he did not cooperate, he would be cast in a dungeon. It was only after the promises of leniency and the threats of punishment that Diep provided any details of the shooting. We conclude Diep's will was overborne and his statements were coerced and, therefore, involuntary. But that does not end our inquiry. We must now determine whether Diep was prejudiced. As we explain below, we conclude he was not.

E. Prejudice

Even if defendant's statements were involuntary, any error in admitting them into evidence was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *People v. Neal* (2003) 31 Cal.4th 63, 86.) The evidence was overwhelming Diep knew what was going to happen that night. At trial, Diep admitted that after the meeting at the garage, they drove around looking for rival gangs so they could retaliate. He also conceded that he knew if they found a rival gang member, Nguyen would use the shotgun. Indeed, there was evidence that when a criminal street gang retaliates, they do so with equal or greater force. A Dragon Family Jr. gang member shot at a Natoma Boys Jr. gang member, and therefore, Natoma Boys Jr. and its allies would have to retaliate with a weapon. Additionally, Vi testified on cross-examination that a gang member who intends to commit a crime would only do so with someone the gang member trusted, and each gang member has a role. From this evidence the jury could reasonably infer Nguyen's role was the shooter and Diep's role was the driver, and Nguyen trusted Diep in that role. Based on all the evidence, we conclude admission of Diep's statements to Echavarria did not contribute to the verdict.

II. Jury Instructions

Diep contends the trial court erroneously instructed the jury with Judicial Council of California Criminal Jury Instructions (2008) CALCRIM Nos. 521, "Murder: Degrees," and 601, "Attempted Murder: Deliberation And Premeditation," because the jury could have convicted him of counts 1 and 2 without finding he possessed the required intent. Not so.

"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] '"The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole."' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

There was no suggestion Diep fired the shotgun, and thus, the prosecutor proceeded strictly on an aiding and abetting theory. The sole issue was whether Diep acted with the requisite intent—whether he aided and abetted the commission of the crimes or whether he feared for his own life and was pressured into being the "wheelman."

The trial court instructed the jury on aiding and abetting principles. The court instructed the jury with CALCRIM No. 400, "Aiding and Abetting: General Principles," as follows: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. Two, he may have aided and abetted someone else, who committed the crime. In these instructions, I will call the other person the 'perpetrator.' A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it."

The trial court also instructed the jury with CALCRIM No. 401, "Aiding And Abetting: Intended Crimes," as follows: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended

to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. *However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor*." (Italics added.)

The trial court instructed the jury with CALCRIM No. 520, "Murder With Malice Aforethought," on the general principles of murder. The court instructed the jury with CALCRIM No. 521 as follows: "If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. [¶] The defendant has been prosecuted for first degree murder under two theories: (1) 'the murder was willful, deliberate, and premeditated' [and] (2) 'the murder was committed by shooting a firearm from a motor vehicle.' [¶] Each theory of first degree murder has different requirements, and I will instruct you on both. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory. [¶] The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the

act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if: [¶] 1. The *perpetrator* shot a firearm from a motor vehicle; [¶] 2. The *perpetrator* intentionally shot at a person who was outside the vehicle; AND [¶] 3. The *perpetrator* intended to kill that person. [¶] A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] A motor vehicle includes a passenger vehicle. [¶] All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than second degree murder. If the People have not met this burden, you must find the defendant not guilty of first degree murder." (Italics added.)

The trial court instructed the jury with CALCRIM No. 600, "Attempted Murder," on the general principles of attempted murder. The court also instructed the jury with CALCRIM No. 601 as follows: "If you find the defendant guilty of attempted murder under count 2, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] The *perpetrator* acted willfully if he intended to kill when he acted. The *perpetrator* deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The *perpetrator* premeditated if he decided to kill before acting. [¶] The attempted murder was done

willfully and with deliberation and premeditation if either the defendant or the *perpetrator* or both of them acted with that state of mind. [¶] The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. [¶] A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved." (Italics added.)

The trial court also instructed the jury with a special instruction as follows: "You may, however, consider evidence of duress for the purpose of determining whether the defendant acted with the requisite intent and/or mental state of the charged crimes, including murder, and the charged allegations. [¶] *The People must prove beyond a reasonable doubt that the [d]efendant had the requisite intent and/or mental state as to each charged offense and allegation*." (Italics added.)

Based on the entire charge, we conclude the trial court properly instructed the jury on the applicable theories of murder and accomplice liability and it is not reasonably likely the jury misconstrued or misapplied its words. (*People v. Harrison* (2005) 35 Cal.4th 208, 252.) CALCRIM No. 400 advised the jury it could convict Diep if he aided and abetted another person who committed a crime and the instructions would refer to the other person as "the perpetrator." The trial court correctly instructed the jury on the elements of aiding and abetting liability in CALCRIM No. 401, including that Diep knew of Nguyen's unlawful purpose and Diep specifically intended to, and did in fact, aid, facilitate, promote, encourage, or instigate Nguyen's commission of that crime.

Further, the special instruction advised the jury it must find beyond a reasonable doubt Diep had the required intent/mental state for each of the charged offenses and allegations.

It is true the trial court substituted "the perpetrator" for "the defendant" because it was the perpetrator, Nguyen, who fired the shotgun. At oral argument, the Attorney General conceded the modification was not perfect. But as we explain above, the prosecutor proceeded on the theory Diep aided and abetted Nguyen, and the court properly instructed the jury on those principles. Additionally, the court instructed the jury it could not convict Diep based solely on his presence in the car (CALCRIM No. 401), thereby reinforcing the requirement the jury must conclude beyond a reasonable doubt Diep possessed the required intent/mental state. "'We presume that jurors understand and follow the court's instructions' [citation]. . . ." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

Diep relies on the fact the jury asked the trial judge several questions during deliberations and that it found not true the special circumstances. During deliberations, the jury asked the trial judge how it was supposed to connect Nguyen and Diep. The judge advised the jury to review the instructions on aiding and abetting. The next day, the jury inquired whether it was supposed to treat Diep the same as Nguyen concerning the attempted murder charge, and the court responded that if the jury convicted Diep on count 2 under an aiding and abetting theory, the jury must then determine whether Nguyen committed attempted murder willfully, deliberately, and with premeditation.

With respect to the jury's questions, the trial judge answered, directing the jurors' attention back to the aiding and abetting instructions, and the jury did not seek further guidance. We presume the jury understood the trial judge's answer to its questions. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234.) As to the jury's findings on the special circumstances, we cannot presume that because it found them not true, there was an instructional error. "The jury may have been convinced of guilt but arrived at an

inconsistent acquittal or not true finding 'through mistake, compromise, or lenity[.]'" (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.)

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.